Supreme Court, U.S.
FILED
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No.03-1440

In The
Supreme Court of the United States
October Term, 2003

KALAMA SERVICES, INC. and ACE U.S.A. INC.,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, and MICHAEL ILASZCZAT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAY LAWRENCE FRIEDHIEM
ADMIRALTY ADVOCATES®
820 Mililani Street, Suite 503
Honolulu, Hawaii 96813
(808) 545-5454
Attorney for Respondent
Michael Ilaszczat

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I. QUESTIONS PRESENTED

1. Whether or not the Ninth Circuit Court of Appeals has erred in upholding the "Zone of Special Danger" doctrine as applied to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901, et seq. by upholding the Benefits Review Board's ruling that the injuries suffered by an off-duty employee during foreseeable horseplay in a bar on Johnston Atoll arose out of his employment under the Defense Base Act, 42 U.S.C. §§1651, et seq.

2. Whether review should be granted to determine whether or not the 50 years of Zone of Special Danger doctrine needs a clearer definition than "personal frolic" in O'Leary v. Brown-Pacific-Maxon, 340 U.S. 504, 507 (1951) to set the limits of behavior excluded from coverage under the Defense Base Act.

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

Respondent Michael Ilaszczat, a U. S. citizen, is an injured employee of Kalama Services on Johnston Atoll covered under the Longshore and Harbor Workers' Compensation Act as amended, 33 U.S.C. 901, et seq. (the Act) as extended by the Defense Base Act, 42 U.S.C. 1651, et seq., and the regulations promulgated under the Act.

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The opinion of the United States Court of Appeals for the Ninth Circuit is published at 354 F.3d 1085 (9th Cir. 2004). The Decision and Order of the Benefits Review Board dated June 19, 2002 is published at 36 BRBS 78 (2002). The Decision and Order Awarding Benefits dated June 13, 2001 is published at 35 BRBS 627 (ALJ)(2001).

STATEMENT OF JURISDICTION

The Ninth Circuit Court of Appeals entered its judgment on January 15, 2004. This court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent statutes involved are the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§901, *et seq.* (hereinafter "LHWCA") and the Defense Base Act, 42 U.S.C. §§1651, *et seq.* (hereinafter "DBA").

I. RESPONDENT'S STATEMENT OF THE CASE

This case is on appeal from the hearing on December 20, 2000 (hereinafter "hearing") before Administrative Law Judge Robert D. Kaplan (hereinafter "ALJ"). Michael Ilaszczat (hereinafter "Claimant") was a civilian employee managing the "self-help store" on Johnston Atoll (hereinafter "JA"). The claimant suffered two major injuries while employed by Kalama Services - one in 1996, resulting in a knee replacement, and one in 1999, resulting in a hip replacement. Kalama Services provides a plethora of support services that includes the operation of recreational

facilities and some of the Social Clubs/bars on JA. Claimant is a well-liked gregarious individual who was known on the island as the "Mayor of JA", in part because he was the man you had to go to to get an air-conditioner for your apartment. See, Appendix C, p. 34(a) to Petition for Writ of Certiorari of Kalama Services and Ace USA, Inc. (hereinafter "Appen. C-34a"). The hearing before the ALJ only pertained to issues related to the 1999 injury in the Tiki social club/bar on JA. Appen. C-34a.

Claimant injured his left hip on July 25, 1999 when he fell to the floor in a bar on JA while engaging in recreational activity after he finished work. The parties stipulated that the event is covered by the LHWCA as extended by the DBA, which includes the "Zone of Special Danger" (hereinafter "ZSD") doctrine. The only appeal issue preserved by petitioners is the ALJ's finding that the claimant's July 25, 1999 injury was causally related to his employment with Kalama on JA.

Claimant, A New Yorker, returned to JA from visiting his sick mother who was in the hospital in New York City. It was a direct flight with one brief stopover in Honolulu. He arrived on JA less than 12 hours before his injury. He went in to work at his office for a couple of hours on July 24, 1999. He then took a nap and a shower. At approximately 9:30 p.m., experiencing jet lag, Claimant went to the Tiki Bar, one of about seven authorized social clubs/bars on JA to unwind. The claimant had a couple of mixed drinks [White Russians] and played pool. He remained at the Tiki Bar until it closed at approximately 12:30 am, and early on July 25, 1999, he then went to the AMVETS, another social club/bar a few minutes away from the Tiki Bar. The claimant had two more mixed drinks [White Russians]. The record contained varying accounts of

the events of the brief period of time at the Tiki bar before the incident early in the morning of July 25, 1999. By all accounts, while at the AMVETS, claimant fell and injured his left hip. Claimant tried to get some people in the Tiki bar to play pool with him. He bought drinks for patrons of the Tiki Bar as he tried to get someone to play pool with him. One patron for whom Claimant bought drinks, Military Policeman ("MP") Burum, had injured knuckles which he claimed came from karate practice. Claimant said words to the effect that "you must not be very good at it." Burum told Claimant he was so good at karate that he could put his foot over Claimant's head without touching Claimant.

Claimant testified that he had bet MP Burum $100 that Burum could not [put] [his] leg over [Claimant's] head without touching [Claimant]. He then accepted Burum's offer to "demonstrate" this karate kick. All witnesses testified that no hostile words were exchanged prior to this "demonstration". Claimant gave conflicting testimony as to whether or not he fell down on his own. The position in which he landed indicated to him that he had not fallen down on his own. Claimant was also told by his treating doctor at the JA Medical Clinic that the severity of his pelvis break could not have happened from a fall alone. This version differed from the testimony of MP Burum and MP Sanchez who claimed that claimant "charged" at Burum and then lost his balance and fell.

Paramedics and police officers took the claimant by stretcher to the Kalama Services Clinic on JA where he stayed for two days, after which he was transferred to Hawaii for hip surgery. A few days later, while recovering from surgery in Honolulu, a representative of claimant's employer gave claimant a notice from the military base commander which said that he was expelled from the Atoll

and was precluded from ever returning. Claimant did return to JA during the discovery phase of the Hearing and participated in the depositions and inspection and photographing of the location of the incident. The Military Order prohibits claimant from returning to JA because of the events of July 25, 1999, and characterizes those events as an "altercation." The military police officer, Schmidt-Smith, who took claimant to the clinic reported that claimant told her that he had been playing pool and that he was walking back from the pool table when his knee gave out and he fell down. Claimant testified in his deposition and at trial, however, that this was not correct, and that the reason he said this was because he did not want to be accused of having engaged in an altercation. There was conflicting testimony from eye witnesses regarding the exact terms of the "wager". There was testimony from the MPs that claimant challenged Burum to try to knock claimant to his knees.

JA is a 2-mile long by ½ mile wide mostly man-made island located west southwest of Hawaii in the Pacific Ocean. It is owned by the United States government. It is utilized by the United States military for storage and decommissioning of chemical, biological, nuclear and other toxic weapons. Habitants of the island are given gas masks and hypodermic injectors with various drugs that they must keep with them at all times, as there is risk of contamination from exposure to toxic chemicals, biological weapon material and nuclear wastes.

Habitants also get neck tags that they must put on after each self-injection in case of an exposure to help to keep them from being killed by those who might find them after an exposure and after they had tried to treat themselves.

Kalama Services is a DBA contractor to the United

States military responsible for providing operating and maintenance services on JA including the operation of various social clubs/bars. Civilians on JA may not come to or leave the island without prior authorization of Kalama Services and the military. These facts support the ALJ's finding that JA is a "ZSD."

The sole question on appeal which was presented to the ALJ is whether claimant's July 25, 1999 injury was causally related to his employment on JA.

II. SPECIFIC FINDINGS OF FACT AND LEGAL ANALYSIS BY ALJ KAPLAN

In the ALJ's Decision and Order Awarding Benefits, see Petition for Writ of Certiorari, Appendix C-p.32a (hereinafter "Appen. C-32a"), the ALJ made certain specific findings of fact in support of his decision.

Claimant first went drinking at the Tiki Bar, an authorized social club on the island that is run by his employer. Appen. C-37a. Claimant had a couple of mixed drinks and played pool at the Tiki Bar. He then went on to AMVETS and more mixed drinks. While at the AMVETS, claimant fell and injured his left hip. Appen. C-37a. Claimant accepted MP Burum's offer to demonstrate his karate kicking skill, i.e., the ability to place his foot over Claimant's head without hurting the Claimant. No hostile words were exchanged prior to the demonstration. Appen. C-38a.

Claimant testified that he was threatened by MP Burum afterwards (i.e., Burum later stated that he would "kill [claimant]" if claimant told anyone about the incident. Appen. C-38a. There was no testimony by any person that

there were any violent or threatening words exchanged prior to claimant's injury. The ALJ specifically found that claimant's version of the events to be more credible and supported by the evidence. Appen. C-39a. The ALJ found that the variations in the testimony regarding the description of the activities made no difference in his legal analysis of this case and the application of the ZSD doctrine. Appen. C-39a, fn. 4.

The ALJ appropriately applied the controlling legal authority and the relevant legal standards regarding the ZSD. Dir., Office of Workers' Compensation Programs v. Greenwich Collieries, 512 U.S. 267(1994); O'Leary v. Brown-Pacific-Maxon, 340 U.S. 504, 506-507 (1951). Appen. C-42a.

The ALJ also reviewed the various cases finding limits to coverage under the DBA under the doctrine of "ZSD". Coverage for DBA injuries is only denied where the injury occurs in "extreme circumstances with little if any connection to their employment." Carlson v. Raytheon Services, 23 BRBS 589 (ALJ) (1999). The Benefits Review Board (hereinafter "BRB") reversed a finding of coverage for an employee asphyxiated while engaging in an autoerotic activity. Gillespie v. General Electric Company, 21 BRBS 56 (1988). A widow who plotted her husband's murder could not recover his death benefits under the DBA. Kirkland v. Air America, 23 BRBS 348 (1990). An employee drowned in a boat accident 30 miles from the job site while bringing sand in a little boat across a lake for improving the beachfront on his vacation home unrelated to his work was found to be covered [arguably this is the least compensable of all the cases finding coverage under "ZSD" in a DBA claim]. O'Keefe v. Smith Hinchman & Grylls Associates, 380 U.S. 359 (1965). An employee parked

with her Supervisor for recreational sexual activities in the moonlight by a remote bay on the island of Guam was hit by a military vehicle and the claim was found compensable under the DBA. Self v. Hanson, 305 F.2d 699 (9th Cir. 1962); An after-hours car accident where claimant was speeding and not authorized to use the vehicle found covered under the DBA. Pan-American World Airlines, Inc. v. O'Hearne, 335 F.2d 70 (4th Cir. 1964). Appen. C-42a and C-43a.

The ALJ stated that "the nature of the reviewed activity must fall well outside the parameters of what is considered 'recreational activity and the foreseeable consequences related to such recreational activity in order to sever the relationship between a claimant's employment and the injury suffered'." Appen. C-43a. The ALJ specifically found that claimant injured his hip in the incident with Burum, which he described as "**a brief one-sided scuffle** occurring after claimant had imbibed several alcoholic drinks." (emphasis added) Appen. C-43a. The evidence failed to establish that claimant's intoxication was the sole cause of his injury removing intoxication from the legal analysis. Appen. C-44a.

There was no credible evidence that claimant initiated the scuffle with Burum. It was apparent to the ALJ that claimant was a somewhat reluctant participant in the incident. Appen. C-44a. The ALJ found that claimant established a relationship between his injury and his DBA employment under the "ZSD" doctrine. Appen. C-44a.

Claimant and other DBA employees on JA had limited choices and opportunities for recreation. This is the reason that the military authorized the operation of the "Social Clubs" on the atoll. With the existence of clubs

serving alcohol to employees and the employees' lengthy periods of isolation in the middle of the Pacific Ocean, the ALJ found that it was clearly foreseeable by both the military authority and the DBA employer that risky horseplay or scuffles such as that which occurred to the claimant would occur from time to time. Appen. C-44a-45a. The ALJ found that this was not an instance in which the employee's conduct went so far from his employment and became so thoroughly disconnected from the service of his employer that it would be entirely unreasonable to say that the injury suffered by him arose out of and in the course of his employment. Appen. C-45a. Claimant participated in the "demonstration" thinking that he would not get hurt because MP Burum would accomplish what he had promised or because claimant would be able to block the kick. Appen. C-45a. Even if claimant was engaged in "unauthorized" or prohibited behavior, i.e., assuming that Employer's characterization is accurate and the incident involving wagering and fighting, this fact alone does not necessarily establish that Claimant's behavior was unforeseeable. The incident was certainly "foreseeable", if not foreseen by claimant's DBA employer, Kalama Services. Appen. C-45a. The ALJ found that the mere fact that fighting is prohibited does not necessarily preclude claimant's recovery under the DBA, even if fighting constituted grounds for expulsion from the atoll. Appen. C-46a. Claimant's conduct was not so egregious that it severs the relationship between his employment and the injury under the ZSD doctrine. Appen. C-46a.

III. REFLECTIONS ON PETITIONER'S QUESTIONS PRESENTED

The novel spin on the facts and derogatory attacks by Petitioner on the 9th Circuit Court of Appeals alone should

not be sufficient to obtain a Writ of Certiorari from this Court. The repeated use of the word "circumvented" by Petitioner is a particularly charged presentation of the Court of Appeals decision. Circumvention is the act of prevailing over another by arts, address, fraud, deception, imposture, or delusion. Circumventive behavior is deceiving by artifices or deluding. A circumventor is one who gains his purpose by cunning. Such malice is absent in the 9th Circuit decision. Petitioner is arguing for Certiorari because of the need in the Defense Contracting industry for a clearer definition of coverage than that afforded in the 1951 case of O'Leary v. Brown-Pacific-Maxon, 340 U.S. 504, 506-507 (1951). Appen. C-42a.

The ZSD is a "judicially created" doctrine and this Court should have the responsibility for its proper interpretation and administration. Granting Certiorari would benefit both the employer and DBA workers as this case presents a novel question of the relationship of the Military Command Order to the DBA coverage. There is no reported split amongst the circuits in the interpretation of the ZSD doctrine. The ZSD doctrine is applied on a case-by-case basis. This is because the first question always concerns the environment that the employees are working in and the variable special dangers the workers are exposed. Petitioner is correct in looking for some clear definitions of "what's in" and "what's out" of coverage. Employees like Claimant deserve to know if they are entitled to coverage during their off-clock time. Remember, these cases arise from situations where injured U. S. citizen civilian contractor workers are denied medical benefits and Workers' Compensation payments and must fend for themselves because their employer is testing a vague area of the law. Claimant was abandoned by his U. S. government contractor employer and its approved insurance carrier while he lay in the hospital

recuperating from a hip replacement.

The Petitioner complains of the imposition of "absolute liability" without explanation. Workers' Compensation coverage is absolute in the sense that it is the exclusive remedy available to the worker against his employer. Liability coverage under the ZSD is not absolute in that there are "unreasonable recreation" and "relationship to work" exceptions.

There was no finding by the ALJ that the claimant engaged in actions which were "prohibited by the United States military command and unrelated to the contractors' employment functions." The ALJ did not find an "altercation" had occurred. Black's Law Dictionary defines "altercation" as: Warm contentions in words. Dispute or controversy carried on with heat or anger. Ivory v. State, 128 Tex.Cr.R. 408, 81 S.W.2d 696, 698 (1935). Black's Law Dictionary, 5th Ed., (1979). The testimony was that in past instances of an "altercation" on JA, both parties to the altercation were expelled or "debarred." Claimant received his debarment letter while he was in the hospital in Honolulu. There were no consequences to MP Burum who the ALJ found to be the aggressor in the one-sided "demonstration" after a full adversarial hearing before the ALJ.

The employer argues for Certiorari because the number of DBA cases is increasing exponentially as the privatization of U. S. military functions expands in response to "terrorism" and "nation-building obligations." These representations in their Petition are supported by the news and current events without statistical data from the Dept. of Labor. The ZSD doctrine has never been addressed by Congress.

The fate of these injured American workers risking their life and health to serve their country for extraordinary high pay in dangerous and remote locations abroad is uniquely in the hands of this Court. DBA claims are proportionate to U. S. military actions. There are problems for DBA employers knowing the extent of their exposure and problems for DBA employees believing they have 24/7 coverage on these jobs vital to the security of our nation.

The ALJ did not apply nor does Respondent believe that he should have applied military standards of conduct to this civilian Workers' Compensation claim. If questionable military investigations are controlling when applied to LHWCA Procedures, then Certiorari is appropriate to clarify this relationship between these conflicting, each potentially controlling authorities.

The 9th Circuit did not circumvent the "ZSD" doctrine, nor did this Panel reject considerations regarding the increasing number of civilian workers at defense bases around the world. These factors have changed dramatically since the time of the hearing and no evidence was put on regarding the increasing number of claims. The issue is not appropriately placed into consideration at this time, except perhaps for the Court's continuing duty to clarify standards especially when the standard is usually applied in the first instance to an injured workers at the time they are most in need of clarity in the legal standard.

The reference to the "judicially created" ZSD doctrine implies an accusation of an activist court. The employer focuses on the parameters of circumstantial events and employee actions which impose DBA liability. DBA coverage arises out of the employer-employee relationship and the liability arises from the legal obligations the U. S.

government places on these DBA employers. The DBA Workers' Compensation coverage is thought of as around-the-clock coverage for individuals who work in extraordinary situations where there is restraint on normal personal freedoms of movement and exposure to intensely dangerous situations while these workers are living abroad for the benefit of our country.

This claimant was abandoned in the hospital without resources because of the vagueness of the ZSD doctrine in the case law and Justice Frankfurter's reference to the concept of "frolic on their own" as a possible basis for exclusion from coverage. O'Leary, 340 U.S. at 507. When you have a DBA situation, it is common that disputes arise regarding "off-duty activities" resulting in injury to a claimant. We need to have a rule that reduces litigation because the parties understand the law and can behave accordingly. This problem of DBA coverage is affecting hundreds of injured or deceased American heroes of the war on terrorism. The Supreme Court should deny Certiorari because the ALJ reached the correct decision on coverage in this case.

The workers need to know clearly what is covered and not covered under the ZSD doctrine, and the workers need to know whether military standards of conduct apply to them. The fact that the ALJ interpreted the ZSD doctrine in our favor in this matter does not mean that future ALJs will do the same. This presents a problem for current DBA employees who may find themselves abandoned by their employers in some foreign location, i.e., Iraq, Afghanistan.

Claimant acknowledges that his behavior in the Tiki Bar that night could be characterized as "frolicsome ". But Claimant disputes the contention that his engaging in

recreation is of no benefit to his employer. The employer benefits from having a refreshed entertained and relaxed employee to work under uniquely dangerous and anxiety-producing situations such as those presented on JA.

Employer's second question raises the specter of the Claimant "knowingly and voluntarily participating" in conduct prohibited for other purposes on the base. The employer tries to raise the magnitude of the "military order permanently barring the employee from the locale" to a level equivalent to 100% contributory negligence per se. The Petitioner then adds the phrase "and from further private government contract work." Claimant is not prohibited from working in other DBA situations and performing further private government DBA contract work. Claimant is disabled and therefore cannot perform this work but had he been physically rehabilitated, he would be allowed to go back to work in a DBA situation, though not on JA.

IV. REFLECTIONS ON THE EMPLOYER'S STATEMENT OF THE CASE

The employer rests their Petition for Writ of Certiorari on the dissent of Justice Harlan in O'Keefe v. Smith Associates, 380 U.S. 359, 369 (1965) as an attempt to solidify the exclusion of "frolics" from DBA coverage. Frolic is variously defined as: 1) merry play; gay prank; gaiety; fun; 2) a merry making or party; 3) to gambol merrily; to play in a frisky, light-spirited manner; have fun; play merry pranks; 4) archaic: gay, merry, full of fun - See, The Random House Dictionary of the English Language, The Unabridged Edition, 1966. The term "frolic" does not belong in the legal standard applied to ZSD in 2004. Petitioner raises the possibility that the frolicsome actions being specifically prohibited by the military authority should

result in compulsory debarment from the location should be a "per se" bar to recovery in a Workers' Compensation situation under the DBA.

The ALJ heard the testimony, including that from the newly appointed Installation Commander, Colonel Thomas, who did not even bother to contact claimant or speak with claimant regarding the incident or his investigation. Col. Thomas did check with his claimant's employer's supervisor, who was concerned with the fact that the Kalama Services already had a claim for Claimant's knee replacement, and now they have a claim for his hip replacement. Only debarring one individual in this altercation is not consistent with the way these matters had been handled in the past. This calls into question the due process rights of the Claimant in the military proceeding that resulted in the Military Order, which deprived the Claimant of his employment rights and Workers' Compensation benefits.

While it is true that the Commander has complete and final authority on standards of conduct imposed on military and civilian personnel, he does not have jurisdiction in determining a recovery in a DBA Workers' Compensation claim. There is no evidence in the record that any "due process" was afforded to this civilian United States citizen in the military proceeding resulting in his removal from the island and the loss of his valuable job-related rights. All we know is that claimant was contacted in the hospital after the debarment decision was made, and told by his employer that claimant would not be allowed to return to JA.

While gambling and physical altercation may be strictly prohibited under the base policy, it appears that it was a moderately tolerated behavior in bar situations in the

social clubs on the island according to the bartenders and other people who testified.

There actually is no evidence that any gambling occurred in our case other than in Claimant's response to MP Burum's statement that he could place his foot over Claimant's head in which Claimant says words to the effect of "I'll bet you can't." The ALJ who heard testimony did not find that the prohibited activities of physical altercation had occurred and rendered no opinion on whether or not the frolicsome behavior Claimant engaged in actually constituted "gambling".

What is not before the court today is whether or not the ALJ's resolution of the conflicting accounts in the finding that Claimant is credible and the witnesses, MPs Burum and Sanchez, were found to be less credible. Is this finding of credibility subject to review at this point in this proceeding? This finding was upheld by the BRB and the 9th Circuit Court of Appeals and should not easily subject to reversal in the Supreme Court. It is not a question of whether any judge or the judges on the Supreme Court might have reached a different conclusion about the credibility of witnesses. It is only a matter of was there sufficient evidence in the record to sustain what the ALJ found. The testimony about the various bars on JA supported this finding coupled with the testimony about life in general on JA. Petitioner does not actually argue that there was not a ZSD , only that it should not apply because they equate frolicsome with altercation, and because Col. Thomas debarred the Claimant from JA after the incident.

The ALJ characterized the event as a test of physical prowess and made no finding that some sort of "altercation" had occurred. It is a stretch for the Petitioner to say that

claimant engaged himself in the physical challenge when all he did was stand there and when Burum was unable to put his foot over his head, turned around to walk away and said , "That's it, I'm out of here." The ALJ made no finding that there was a fight. He made a specific finding that there was no hostility in the events leading up to the injury. Col. Thomas' decision happened only days after the event while the claimant was in the hospital and unable to present evidence about the situation on his own behalf. Petitioner's Brief at p. 5.

Petitioner argues that the effect of the Claimant's misrepresentation of the circumstances leading up to his injury to the initial police officer who came in to investigate the injury should be a denial of his claim. Veracity of the claimant was thoroughly delved into by the ALJ in this hearing. The police officer Schmidt-Smith testified by deposition. The ALJ questioned the claimant himself and decided that even though he told Patrolman Schmidt-Smith that he fell walking back from a pool game that the claimant was being truthful when he testified to the ALJ.

The continued references to "absolute liability" is an attempt to arouse sympathetic interest from members of the court who might be concerned about the protection of vulnerable civilian military DBA contractors who need protection from conniving injured workers who are being protected by a circumventive 9th Circuit Court of Appeals. Claimant drank Black Russians and White Russians, and we can assume that there was vodka in those drinks. That may be the only "Absolute" in this case.

Practitioners of DBA cases and employees who work in the DBA system understand that these workers have something near to 24 hours, 7-day a week coverage. If that

is not true, a grant of Certiorari would be appropriate. There are exceptions to this extensive scope of coverage under the DBA. The limits to those exceptions are naturally defined by the cases in which coverage was not found. The guiding light of No-Coverage cases was a claimant who was engaging in autoerotic asphyxiation which is a type of masturbation usually done standing on a ladder with a noose around a person's neck. It is particularly dangerous and results in numerous deaths worldwide each year. Does the high numbers of deaths tend to make it foreseeable recreation?

The finding of no DBA coverage in that case was because the record lacked evidence bearing on the Claimant's motivation for engaging in the activity as well as that the circumstances surrounding the death did not suggest that the death was work-related. Gillespie v. General Electric Company, 21 BRBS 56, 58 (1988). This implies that Gillespie, *supra,* might have been decided differently by the BRB if a better record had been made to the ALJ supporting the ZSD because the loneliness and lack of sexual outlets available to the Claimant because of his job

With Supreme Court Rule 24(g) in mind, I say in abbreviated form that one would assume under the current standard that normal sexual activity would be covered under the Act. There is evidence that individuals participate in sexual activity with varying degrees of frequency and on the theory that healthy sex is good for work productivity. Would a death from heart failure during normal sexual activity to a DBA worker be covered under the Act pursuant to the ZSD? There are numerous other potentially damaging recreational experiences of a sexual and non-sexual nature that an employee might be engaging in from time to time in a DBA situation and each poses a potentially

novel question of coverage under the ZSD with our current "frolic" standard. Where is the limit of covered behavior under the current frolicsome standard? To the injured claimant, or the widowed beneficiary, a clear standard matters because it leads to efficient determinations of coverage and reduced litigation. Claimant's counsel who only gets paid after the final appeal is finished would like to know within reason which cases have merit and are likely to be found to be covered under the ZSD.

This is a case in which an individual walks into a bar, orders a couple of drinks, and tries to start a pool game with two relatively uninterested individuals. This is not the type of behavior that should be so difficult to determine whether or not it is covered under the ZSD. Going into the bar was obviously not a prohibited activity. Claimant was never off the job site as the entire island is regulated, controlled and supervised by his employer as well as the military commander. There was no finding that the claimant was engaged in an "altercation." The main buzzwords that Petitioner is using to try to get this Court to review this case are "absolute liability"; "injured off duty"; "drinking and socializing in a local bar"; "engaging in conduct expressly prohibited by the military command"; "gambling"; and "involvement in a physical altercation". When it comes down to it, the worst the Petitioner can say about Claimant was that his actions were "frolicsome" and therein lies the rub. I remember when the word gay meant happy and frolicsome meant great fun. How does anyone know what type of behavior will exclude a claimant from coverage under the DBA?

What is uniquely similar in both of the actions that Claimant is accused of engaging in resulting in his disbarment is that both gambling and altercations are just not

something that can usually be done alone. You cannot really bet by yourself, though the internet may be changing this. Certainly you can bet against yourself, like in life insurance. If one stood in front of a mirror and made a bet against one's self, would it qualify as gambling for a denial of DBA coverage because it is a prohibited activity?

Col. Thomas' finding of the physical altercation was not consistent with the findings of the ALJ in our case. If the military investigation and order is controlling authority in this DBA/LHWCA case, then a grant of Certiorari would be appropriate to clarify the misunderstanding of the ALJ, BRB, 9th Circuit and counsel for the Respondent. The Military Order merely means Claimant cannot go back to JA. It should be of no other relevance to this appeal.

Petitioner claims the employee in this case "admitted his knowledge of these rules, as well as his knowing and voluntary violation of them." Claimant admitted sensitivity to a potential accusation that his behavior could be construed as a violation of the base rules. That is the reason Claimant gave to the ALJ to account for what he told to police officer Schmidt-Smith. The ALJ found that it was not prohibited to go into the bar, to drink at the bar, to play pool at the bar, and that karate is taught on the island. There is significant evidence in the record about the employer's recreational facilities and opportunities that they provide to their DBA workers to get them to go work in this extraordinary foreign location.

The 9th Circuit Court of Appeals found that the BRB did not err in ruling that this situation arose out of the ZSD and that that doctrine applied in this case. The Panel understood the situation on JA and cited to Farrell v. United States, 313 F.3d 1214 (9th Cir. 2002) for facts regarding the

history of JA. Circuit Judge Silverman wrote the Farrell, *supra,* opinion and our opinion. The 9th Circuit reviewed the accounts that the ALJ found to be credible and that the BRB had similarly upheld when they addressed the question of the different accounts given by the two non-believed witnesses. The Circuit Court did not comment on the BRB's upholding that even if the ALJ had found the two MPs' accounts to be more credible, that fact alone would not have changed coverage under the DBA.

Petitioner should have to accomplish two levels of challenge to the findings below to get the Supreme Court to consider that it may be reasonable to review this case. First, the Court would have to find that the ALJ abused his discretion in believing the claimant, instead of believing the two MPs. Then the Court would have to find that even if the MPs were telling the truth that such behavior would exclude claimant from a recovery under the DBA because of the Military Order. Appellate courts are not supposed to substitute their judgment for those individuals that actually had an opportunity to weigh the evidence. Even if the credibility determination had come out in the other direction, claimant should still have a valid Workers' Compensation claim under the DBA. If he had been charging at the MPs because he wanted to show off his own physical prowess, there still would be coverage. How about a fall while walking back from the pool table after drinking those "absolute" vodka White and Black Russians. That may be excluded only if there was a finding that intoxication was the sole cause of the worker's injury. 33 U.S.C. §903(c).

The testimony was that the claimant showed his medical card that tells airport security screeners about his metal knee replacement to these two MPs while he was buying them drinks. Claimant was marveling about the fact

that he was not totally disabled. This is hardly an individual who is going out and starting a fight as this case is portrayed by Petitioner. All Claimant did was foolishly try to see if this braggart MP really could perform this karate kick with the physical prowess he claimed to possess. What we have here is a brute with a gun who beat an old cripple by probably kicking him when his back was turned and then threatening to kill him if he told anyone about it. That was moments before Claimant told Patrolman Schmidt-Smith that he fell walking back from the pool table. There was testimony that only the MPs have weapons on JA. This case is hardly standing on a ladder with a noose around your neck endangering your own life while masturbating. Going into a bar and wanting to play a game of pool is just not that morally reprehensible except in the town of River City, Iowa in the Meredith Wilson play, "THE MUSIC MAN"; in the Song: "We've Got Trouble" -

> "That's trouble with a "T" and it rhymes with "P", and that stands for Pool and Pool is Trouble for River City."

The 9th Circuit Court applied the proper standard of "substantial evidence to support the factual determinations." There was no substitution of judgment or engaging in a de novo review of the evidence. Appellate courts usually must accept the ALJ's findings of fact "unless they are contrary to the law, irrational, or unsupported by substantial evidence." That is not the problem that the employer is addressing in their Petition for Writ of Certiorari. It is not contrary to law that a worker in a DBA situation would have coverage during normal recreation on their off hours. It is not irrational for the ALJ to award Workers' Compensation even if claimant had engaged in activities which resulted in disbarment from JA because of a Military Order. The

ALJ's decision is supported by substantial evidence in terms of the testimony of all the key witnesses in this case. The testimony was thoroughly and sufficiently reviewed by the ALJ in reaching his opinion.

The 9th Circuit addresses the employer's contention that the claimant's own misconduct caused him to be barred from JA. Appen. A-7a. While this is possibly important to questions like suitable, alternative employment, an important concept under the DBA, the Circuit Court found that the Claimant's own misconduct did not relieve the employer of other obligations under the Act such as to make compensation payments and provide medical care. The failure of the employer to provide the "relevant labor market survey" was not appealed and was not the case before the ALJ or the BRB. That question was not properly raised before the 9th Circuit Court of Appeals.

The 9th Circuit Court analyzed all of the relevant ZSD cases prior to their application of the ZSD to the facts presented in our case. The Court of Appeals listed the findings that make a reversal of the ALJ's conclusions not likely in this case.

The ALJ found that:

1. Employees residing on JA have limited recreational activities, and the military expressly authorizes social clubs/bars on the island.

2. The presence of social clubs/bars serving alcohol to employees who experience lengthy periods of isolation on the atoll creates a foreseeable risk that horseplay

might take place from time to time.

3. Claimant was injured during a brief "one-sided scuffle" in which MP Burum was the aggressor.

4. Claimant participated in the demonstration believing that he would not be hurt either because MP Burum would accomplish what he had promised or because claimant would block the kick.

The Court of Appeals correctly concluded that the BRB committed no error of law and properly held that the ALJ's factual findings were supported by substantial evidence. Appen. A-11a.

The Court of Appeals agreed that under the circumstances of JA, horseplay of the type that occurred in this case is a foreseeable incident of one's employment on JA, citing O'Keefe, 380 U.S. at 363. Seeking recreation under exacting and unconventional conditions is the kind of case to which the ZSD uniquely applies.

The 9th Circuit rejected the employee misconduct assertions of the employer finding that the law is that employee misconduct is, in general, not material in Workers' Compensation law unless it "takes the form of deviation from the course of employment." 2 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW, Sec. 32.00 (2000). Appen. A-12a. Neither the ALJ nor the BRB found that this case was one that involves a "deviation"from the course of employment.

The employer cited below Brooks v. Director, Office of Workers' Compensation Programs, 2 F.3d 64, 65 (4th Cir. 1993). Even though our claimant was discharged as the result of his alleged misconduct, the Brooks, *supra,* case did not establish a rule barring all disability benefits in cases where a claimant is discharged for misconduct. The Court of Appeals read Brooks, *supra,* to stand for a much narrower proposition that a claimant's post-injury job, from which he was later fired for cause, may satisfy an employer's burden to show suitable alternative employment. In our case, claimant's later conduct is never called into question as he was never able to return to his job. He never worked again for Kalama or anyone after he was injured. Appen. A-14a.

CONCLUSION

In the final analysis, as much as I would like to argue in person to this Court that the karate demonstration was not like autoerotic asphyxiation even though they both have a flair for the dramatic. It would take an extraordinary trier of facts to find that the claimant's activities in the Tiki Bar that night on JA were excluded from coverage under the DBA. I therefore am requesting that this Honorable Court deny the Petitioner's Request for a Writ of Certiorari to the 9th Circuit Court of Appeals in this case.

Respectfully submitted,
Jay Lawrence Friedheim
Admiralty Advocates
Attorney at Law
820 Mililani Street, Suite 503
Honolulu, HI 96813
(808) 545-5454
Attorneys for Respondent
Michael Ilaszczat